

Lamonts Apparel, Inc. and United Food & Commercial Workers, Local 1439, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 19-CA-21967

April 28, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, BROWNING, AND COHEN

On a charge filed on March 6, 1992, and amended by the United Food and Commercial Workers, International Union, AFL-CIO, CLC on November 8, 1993, the General Counsel of the National Labor Relations Board issued a complaint on May 10, 1993, and amended on November 19, 1993, and January 24, 1994, against Lamonts Apparel, Inc., the Respondent, alleging that the Respondent violated Section 8(a)(1) and (5) when it discontinued giving bargaining unit employees their annual wage increase while the Union was the putative winner of a National Labor Relations Board election, without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent. The amended complaint further alleged that the Respondent violated Section 8(a)(1) by telling employees that a 1991 cost adjustment increase would not be granted because the employees were then represented by the Union, and by telling an employee that the reason there was no cost adjustment increase was because the employees had chosen to be represented by the Union. The Respondent filed a timely answer admitting in part and denying in part the allegations in the complaint.

On February 14, 1994, the General Counsel, the Respondent, and the Charging Party filed with the Board a stipulation of facts and motion to transfer the case to the Board. The parties stated that the stipulation and attached exhibits contained all relevant facts and evidence necessary for a decision in the case and that they waived a hearing before and decision by an administrative law judge. On August 23, 1994, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a decision and order. The General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, has an office and place of business in East Wenatchee, Washington, where it is engaged in the business of retail sales of apparel and related items. During the 12

months preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, sold and shipped goods or provided services from its facilities within the State of Washington, to customers outside the State, or provided services to customers within the State of Washington, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of \$50,000. During the past 12 months, the Respondent had gross sales of goods and services valued in excess of \$500,000.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The General Counsel alleged, the Respondent admits, and we find that the United Food & Commercial Workers, Local 1439, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC is a labor organization with the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Respondent is engaged in the retail sale of apparel and related items, with stores in Alaska, Idaho, Montana, Oregon, Utah, and Washington. Following an October 9, 1991 secret-ballot election, the Board, on November 20, 1991,¹ certified the Union as representative of all of the Respondent's employees at its East Wenatchee, Washington store, excluding store manager, operations manager, area sales manager, executive manager trainee, guards, and supervisors as defined by the Act.

Since at least 1978, the Respondent has conducted an annual wage and benefit survey, known as the market survey. Data is collected beginning about January or February and is complete by about July or August of that year. The Market Survey is a compilation of the wages and benefits of the Respondent's competitors in each particular market area. The Respondent's vice president of human resources and other management personnel analyze the data and make a recommendation to the executive vice president of whether cost adjustment increases will be made to employees' salaries and how much the adjustments will be. After reviewing the market survey and recommendation, the executive vice president makes a final determination and the results are announced to employees. Although the Respondent compiled and analyzed the 1991 data for East Wenatchee, there was no recommendation for a wage increase for East Wenatchee employees. However, in keeping with past practice, cost adjustment increases for the Respondent's employees in Alaska, Idaho, Montana, Oregon, Utah, and

¹ Case 19-RC-12435, not reported in bound volumes.

Washington were announced in October 1991 by the executive vice president, excluding the Respondent's East Wenatchee employees. There were only two other exceptions to the routine 1991 cost adjustment increases: Seattle, Washington, where wage increases were covered under an existing collective-bargaining agreement; and Missoula, Montana, where, based upon the market survey, increases had been deemed not warranted.

Since at least 1978, the Respondent's East Wenatchee employees had received a cost adjustment increase each year. The amounts ranged from 15 to 20 cents per hour annually since 1984.² In October 1991, soon after the employees had voted in the Union, Store Manager Keri Farnes, an admitted statutory supervisor, announced to the East Wenatchee employees that there would be no 1991 cost adjustment increase because they were now represented by the Union and their wages were subject to collective bargaining. At this time, the Respondent's objection to the election was pending and it had not begun collective bargaining. The Respondent did not notify the Union of its plan not to give the East Wenatchee employees the cost adjustment increase. Through its store manager, it confirmed to East Wenatchee employees that the Respondent's other employees were getting cost adjustment increases for 1991. Those adjustments were implemented on October 27, 1991. The increases ranged from 10 to 30 cents per hour.

The Respondent and the Union first met for contract negotiations on January 8, 1992. The Union presented a full contract proposal including a \$1.50-an-hour wage increase, retroactive to October 1, 1991, the date that it contended the cost adjustment increases should have gone into effect. On January 21, the Respondent presented a nonretroactive wage increase proposal of 10 cents. The Union, on February 6, proposed a 30-cent increase, retroactive to October 1, 1991, to be followed by a 70-cent increase beginning February 1, 1992. During this negotiation session, in response to an employee's comment that they had not received the 1991 cost adjustment increase, Vice President of Human Resources Mary Ryan, an admitted statutory supervisor, stated that there was no cost adjustment increase because East Wenatchee employees had selected a collective-bargaining representative. On February 13, the Respondent made a final offer, including a non-retroactive 20-cent wage increase. The Union rejected the offer on February 20. Thereafter, on March 1, 1992, the Respondent unilaterally implemented its last offer. Despite two additional bargaining sessions with

a Federal mediator, the parties have failed to reach an agreement.

The Respondent admits that the cost adjustment increase relates to wages, hours, and other terms and conditions of employment and is a mandatory subject of bargaining.

B. The Parties' Contentions

The General Counsel contends that the Respondent had a long-established practice of annually surveying market data and granting cost adjustment increases if the data supported an increase. The employees in the East Wenatchee store had received a cost adjustment increase for at least the last 13 years and had an expectation that they would continue to do so at least until the parties reached an initial collective-bargaining agreement to establish wages. Citing the Board's initial opinion in *Daily News of Los Angeles*, 304 NLRB 511 (1991), remanded 979 F.2d 1571 (D.C. Cir. 1992), the General Counsel maintains that this practice was sufficiently established to have become a term and condition of employment. According to the General Counsel, the Respondent violated Section 8(a)(5) when it unilaterally changed its policy without giving the Union, the putative winner of the election, notice and opportunity to bargain over the proposed change until agreement or impasse.

The General Counsel further contends that on two separate occasions, by announcing to its East Wenatchee employees that the reason they were not given cost adjustment increases was that they voted to be represented by the Union, the Respondent violated Section 8(a)(1) of the Act.

The Respondent contends that it could not grant a wage increase because it was obligated to bargain with the Union over what were clearly discretionary wage increases. Relying on *Anaconda Ericsson Inc.*, 261 NLRB 831 (1982), the Respondent argues that the timing and amounts of wage increases were discretionary and that an employer is not compelled to grant discretionary wage increases when it is involved in negotiations with a union. In this case, it argues, it began conducting its wage survey in the summer of 1991 and before any increase could be decided upon, the employees had selected the Union as their bargaining representative.

The Respondent urges the Board on remand to "correct" its holding in *Daily News of Los Angeles*, supra. There, it argues, the Board failed to discern the difference between a discretionary increase and a fixed automatic increase and thus failed to follow precedent in finding that the employer violated Section 8(a)(5) and (1) of the Act by discontinuing a discretionary wage increase program.

Finally, the Respondent contends that given the totally discretionary nature of the wage adjustments,

²From 1978 through 1983, cost adjustment increases in the hourly wage were granted pursuant to the market survey for each given year. In subsequent years the amounts were as follows: 1984, 15 cents; 1985, 15 cents; 1986, 20 cents; 1987, 15 cents; 1988, 15 cents; 1989, 20 cents; 1990, 20 cents.

there is no “benchmark” against which to fashion a remedy governing the amount of any wage increase.

Analysis and Conclusions

In *Daily News of Los Angeles*, 315 NLRB 1236 (1994), we recently reaffirmed the proposition that an employer that has a practice of granting merit raises that are fixed as to timing but discretionary as to amount may not discontinue that practice without bargaining to agreement or impasse with the union.³ As we stated in *Daily News*, supra at 1237:

The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge. [Citing *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (1970).]

Here, we find that the Respondent had a long-established practice of annually surveying and granting appropriate cost adjustments based on the survey data. Over a period of 13 years, employees in the Respondent's East Wenatchee store had received this increase based on the results of its market survey. Indeed, on October 27, 1991, the Respondent implemented wage increases in 19 of its 22 areas. The Respondent's past practice was sufficiently well established to have become a term and condition of employment. Nevertheless, at the time when the Union was the putative winner of the representation election, the Respondent failed to make a recommendation regarding a wage increase based on the data it compiled in its market survey, and this departure from past practice was made without notifying the Union and giving it an opportunity to bargain.⁴

Accordingly, for the reasons stated in *Daily News*,⁵ supra, we find that the Respondent's discontinuance of its customary wage adjustments in October without notice to the Union or opportunity to bargain to agreement or impasse violated Section 8(a)(5) and (1) of the Act. Further, because the unilateral change in past practice violated the Act, the Respondent's statement to employees in October 1991 and during January 1992 negotiations that there would be no annual cost adjustment increase because employees had chosen a

collective-bargaining representative violated Section 8(a)(1) of the Act. *Harrison Ready Mix Concrete Co.*, 316 NLRB No. 53, slip op. at 1–2 (Feb. 7, 1995); *LRM Packaging*, 308 NLRB 829, 833 (1992).

CONCLUSIONS OF LAW

1. Lamonts Apparel, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers, Local 1439, chartered by United Food and Commercial Workers International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate collective-bargaining unit is:

All employees of the Employer at the 511 Valley Mall Parkway, East Wenatchee, Washington location; excluding store manager, operations manager, area sales manager, executive manager trainee, guards and supervisors as defined in the Act.

4. At all times since October 9, 1991, the above-named labor organization has been the exclusive bargaining representative of Respondent's employees in the appropriate unit for the purposes of collective bargaining by virtue of Section 9(a) of the Act.

5. By unilaterally changing its past practice of recommending cost adjustments for employees based on data compiled in its market survey and giving an annual wage increase without giving the Union a meaningful opportunity to bargain, the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act.

6. By telling employees that they would not be given cost adjustment increases because they had chosen to be represented by the Union, the Respondent violated Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.⁶

Because the Respondent failed to make a recommendation for a wage increase based on the data it compiled in its market survey, which increase employees might have received but for the Respondent's unilateral conduct in violation of Section 8(a)(5), we order

³ *Daily News of Los Angeles*, supra, opinion after remand. The violation in this case would exist under either of the views expressed in *Daily News*.

⁴ Regarding unilateral changes made while election objections are pending, see, e.g., *L & M Ambulance Corp.*, 312 NLRB 1153, 1156 (1993); *Millard Processing Services*, 310 NLRB 421, 425 (1993).

⁵ In *Daily News*, supra, we overruled *Anaconda* to the extent that the decision addressed the unilateral discontinuance of merit increases. We therefore reject the Respondent's argument to the extent it relies on *Anaconda*. (See also in this regard fn. 3 in *Members Stephens' and Cohen's* concurring opinion in *Daily News*.)

⁶ We reject the Respondent's contention that it is impossible to fashion a remedy because there is no fixed yardstick governing the amount of any wage increase. As set forth, we direct the Respondent to rely, as it has in the past, on its own market survey to provide the necessary yardstick.

the Respondent to make whole each of the employees for the increases they would have received, if any, from the date the practice was unilaterally discontinued, apparently about October 9, 1991, by payment to them of any difference between their actual wages and the wages they would have otherwise received. The amount shall be computed on a quarterly basis in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Lamonts Apparel, Inc., East Wenatchee, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food & Commercial Workers, Local 1439, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC as the exclusive bargaining representative of its employees employed by the Respondent at its East Wenatchee, Washington store, excluding store manager, operations manager, area sales manager, executive manager trainee, guards, and supervisors as defined in the Act, by unilaterally changing its past practice of granting cost adjustments based on the data compiled in its annual market survey.

(b) Informing employees that they would not be given cost adjustment increases because they had chosen to be represented by the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the employees in the appropriate unit for any monetary losses they may have suffered by reason of the Respondent's unilateral withholding of annual wage increases that the employees would have received. The amount shall be computed on a quarterly basis in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its East Wenatchee, Washington facility copies of the attached notice marked "Appendix."⁷

⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with United Food & Commercial Workers, Local 1439, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC as the exclusive bargaining representative of all employees employed by us at our 511 Valley Mall Parkway, East Wenatchee, Washington location excluding store manager, operations manager, area sales manager, executive manager trainee, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally withhold any wage increases from you to which you may have been entitled.

WE WILL NOT inform employees that they will not receive a cost adjustment increase because they have chosen a collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, reinstate the wages and terms and conditions of employment which existed before the unlawful unilateral changes.

WE WILL make whole the employees in the unit described for any monetary losses they may have suffered by reason of our unilateral withholding of the annual cost adjustment increases based on the annual market survey.

LAMONTS APPAREL, INC.